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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 912

JAMES R. HOFFA, LARRY CAMPBELL, THOMAS EWING PARKS, and EWING KING,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on September 14, 1967.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 382 F. 2d 856, and is printed as Appendix A, *infra*. The opinion of the Court of Appeals in denying the petition for rehearing is printed herein as Appendix B, *infra*. Opinions of the District Court are printed respectively as Appendix C and Appendix D, *infra*.

JURISDICTION.

The judgments of the Court of Appeals (Appendix E, *infra*) were entered on September 14, 1967. A timely petition for rehearing was denied on October 16, 1967

(Appendix B, *infra*). On November 2, 1967, Mr. Justice Stewart extended the time for filing of the petition for a writ of certiorari to December 15, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

I. Whether petitioners are entitled to a new trial where it is shown by affidavits submitted by them on a motion for new trial based on newly discovered evidence that two jurors failed to disclose on voir dire examination that they entertained a bias and prejudice against one of petitioners, and had prior to trial expressed their intention to convict said petitioner.

II. Whether petitioners are entitled to a hearing on their motion for new trial based on newly discovered evidence, supported by affidavits alleging that certain jurors had prior to trial made extra-judicial statements evidencing their prejudice toward one of petitioners and their intention to convict him; that marshal and jurors engaged in improper conduct and discussions during the trial; and that the trial court during the trial had expressed a personal bias against said petitioner.

III. Whether petitioners, having filed a motion for new trial based on newly discovered evidence alleging misconduct of the marshals and jurors during the trial, and alleging that the Court had during the trial expressed a bias and prejudice against one of petitioners, are entitled to a disqualification of the trial judge, and to have said motion for new trial considered and determined by another judge, particularly after the Court has denied that it had expressed such bias and prejudice.

a. Whether a motion for disqualification of a trial Judge under Section 144, Title 28, United States Code, must be predicated on matters which occurred prior to the trial.

b. Whether a petitioner's post-trial motion for disqualification of a trial Judge under Section 144, Title 28, United States Code, must be accompanied by a good faith certificate of the local attorney who had represented him at the trial, but had withdrawn prior to the filing of said motion, where it was accompanied by a certificate of said petitioner's other trial counsel and by a certificate of a co-defendant's local trial attorney who entered his appearance post-trial as attorney for said petitioner.

STATUTES AND RULE INVOLVED.

Section 144, Title 28, U. S. C., provides as follows:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exist, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Section 455, Title 28, U. S. C., provides as follows:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or con-

nected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Rule 33, Federal Rules of Criminal Procedure, provides in pertinent part:

"... A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the Court may grant the motion only on remand of the case ..."

STATEMENT.

Nature of the Action.

On March 4, 1964, petitioners were convicted on an indictment charging endeavors to influence petit jurors in the earlier trial of the case of **United State v. James R. Hoffa and Commercial Carriers, Inc.** This Court on December 12, 1966 affirmed said convictions, 385 U. S. 293. Petitioners are presently incarcerated under the sentences imposed on said convictions.

On September 1, 1965 petitioners filed in the District Court a motion for a new trial on the ground of newly discovered evidence, alleging that certain jurors and marshals were guilty of improper conduct during the trial, and that the Court and certain jurors were prejudiced against petitioner Hoffa, and that by reason thereof petitioners had been denied their constitutional guarantee to trial by an impartial jury and their rights to due process of law under the Fifth and Sixth Amendments of the United States Constitution (App. 7a-89a; 94a-98a).[1]

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[1] "App." references are to petitioners' joint appendix which was filed in the Court of Appeals.

The District Court denied the motion for a new trial and the request for a hearing thereon (App. 257a-267a, 272a), and also denied petitioners' motions to disqualify the trial court from determining said motion for new trial (App. 117a-127a; 272a). The Court of Appeals for the Sixth Circuit affirmed (Appendix A, *infra*).

The Allegations of the Motion for New Trial.

1. The motion for new trial alleged that shortly prior to September 1, 1965, the date of the filing of the motion, petitioners learned for the first time that certain jurors had failed to disclose on voir dire examination that they harbored a prejudice against the petitioner Hoffa and that they intended to convict him. All prospective jurors had been asked on voir dire examination whether they had any sympathy for or prejudice against any party to the suit, whether they had expressed any opinion about the guilt or innocence of the petitioners, whether they had discussed the trial with anyone and whether they knew of any reason why they could not give both sides a fair trial (App. 73a, 59a-89a, 85a-87a, 60a-65a). Yet, the motion for new trial alleged, and affidavits attached to the motion asserted that juror Kilgore had stated to a fellow employee a few days before the commencement of the trial that if he could get on the jury he would "hang" petitioner Hoffa and would see that he "got what was coming to him". The juror had stated that "Hoffa is guilty as far as I am concerned" (App. 46a). After the trial the juror confirmed his prior prejudice against petitioner Hoffa and told a fellow employee that he had done his part to convict said petitioner Hoffa and that it "was worth it", and that he had meant what he had earlier stated, that he was going to convict (App. 47a).

The motion and supporting affidavits further asserted that juror Starnes prior to the trial told his fellow em-

ployees that if he got on the jury he would convict petitioner Hoffa and that said petitioner was "guilty of about anything they accused him of" (App. 40a-41a). To another co-employee, said juror stated prior to the trial that petitioner Hoffa was "no good and should be convicted and if he was on a jury trying him he would convict him" (App. 42a).

Both of said jurors had given no indication on voir dire examination that they could not give petitioners a fair trial or that they were prejudiced against them (App. 60a-65a, 73a).

In response to these allegations of the motion for new trial, the government filed affidavits of jurors Kilgore and Starnes denying the statements attributed to them (App. 156a-159a; 165a-167a).

2. The motion for new trial with attached affidavits further alleged that although the jurors were ordered to be sequestered at a hotel during the trial and had been instructed not to discuss the case with others or among themselves (App. 88a-89a), nevertheless certain jurors during the trial made statements to third persons that the jury had already made up its mind to convict petitioner Hoffa, that although he had not been convicted before, the jury would see to it that he got what was coming to him, that the male jurors had already decided to convict and that the lady jurors would "go along" with such decision (App. 13a-26a, 28a-31a). Among the affidavits filed in support of the charge that the jurors had already decided to convict was the affidavit of one Marie Monday. It was also alleged that the marshal in charge of the jurors made prejudicial remarks with reference to the guilt of petitioner Hoffa, stating that Hoffa would be convicted one way or another, and that he would be put where he belonged (App. 26a, 19a).

It was further alleged that during the trial marshals attached to the sequestered jury, with the assistance of certain bellboys, furnished certain of the male jurors with prostitutes. Affidavits of Patsy Jo Harris and Bobbie Ann Sells, admitted prostitutes, asserted that during the trial they had engaged in sexual relations with seven designated jurors (App. 14a-15a, 23a).[2] It was further alleged that certain jurors attended parties with marshals away from the hotel, were intoxicated, and acted in an unbecoming manner (App. 17a-21a, 22a, 29a-31a).

The government filed counter-affidavits of the marshals in attendance to the jury, and of all but one of the jurors, denying substantially the charges set out in the motion for new trial (App. 138a-257a).

3. The motion for new trial also asserted that the trial Judge was biased and prejudiced against petitioners, because the Court had made remarks outside of Court, indicating an intention to convict petitioner Hoffa, and that said prejudice denied petitioners a fair and impartial trial (App. 9a-10a). Said allegation was based on the affidavit of the said Marie Monday (App. 32a-33a).[3]

Petitioners further asserted that they had acted with due diligence in attempting to obtain such evidence, but

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[2] Catherine Johnson, also known as Patsy Jo Harris, was on August 30, 1967 convicted in the District Court on a charge of perjury committed before a federal grand jury by reason of her testimony that she had engaged in sexual intercourse with several of the jurors. Said conviction is now pending on appeal.

Patricia Ann Essex, also known as Bobbie Ann Sells, has been convicted under the Juvenile Act in the District Court on a charge of obstruction of justice, by reason of her causing to be filed the affidavit referred to above, but the Court has not yet entered judgment on said conviction.

[3] On April 21, 1967, in a pre-trial conference related to a separate motion for new trial filed by petitioners on the issue of government wiretapping, government counsel represented that said Marie Monday had recanted her said affidavit.

that they were unable to obtain the same prior to the date of the execution of the affidavits in question (App. 11a, 49a-56a). Petitioners requested a hearing on their motion (App. 11a), but the District Court ruled the motion for new trial on the affidavits and counter-affidavits, and denied a hearing (App. 257a-267a). The Court held that petitioners had not shown due diligence in attempting to obtain the "newly discovered evidence" at an earlier date (App. 262a-264a). The Court also made findings that none of the jurors had made prejudicial statements against any petitioner, that no juror failed to give truthful answers on voir dire examination, and that none of the marshals or jurors engaged in any improper conduct during the trial. (App. 264a-266a).

The Denial of the Requests for Disqualification of the Trial Court.

As stated, one of the allegations in the motion for new trial was that the petitioners had been denied a fair trial by reason of the bias of the trial Court, in view of the Court's statements during the trial of its intention to convict petitioner Hoffa. Simultaneously with the filing of the motion for new trial, petitioner Hoffa filed an affidavit of disqualification of the trial Court under Section 144, Title 28, U. S. C. (89a-93a). Attached to the application was the affidavit of said Marie Monday, in which it was alleged that during the trial the District Court had met said Monday and had told her that "Hoffa was going to get what was coming to him this time and that he was going to see to it that he did"; and that on a subsequent occasion, while the trial was still in progress, the court stated that Hoffa was "going to be convicted" because he (the Court) was "in charge of it" (App. 91a).[4] The

[4] See footnote 3, *supra*.

other petitioners also filed affidavits of disqualification of the trial Court, based on said affidavit (App. 98a-104a).

The petitioners' affidavits for disqualification of the court were accompanied respectively by certificates of good faith by counsel of record (App. 90a, 98a-104a). Petitioner Hoffa's affidavit was supported by the certificate of his then counsel of record, James E. Haggerty, Sr., of the Michigan Bar and Harold E. Brown, a member of the Bar of the District Court below (App. 90a). Petitioner Hoffa's counsel at the trial were said Haggerty and one Harry Berke. Berke had withdrawn as counsel shortly after the verdict below, and Brown, who had represented petitioner King during the trial, requested that he be entered as local counsel for the petitioner Hoffa when said affidavit of disqualification was filed (App. 2a).

The District Court on the motion of the government entered an order striking the affidavit for disqualification, on the grounds that petitioner Hoffa had filed a prior affidavit of disqualification as to an earlier Judge, that the affidavits for disqualification were not timely filed, that petitioner Hoffa's affidavit was not accompanied by a proper certificate of good faith executed by counsel of record, and that as to the petitioners other than Hoffa, their affidavits for disqualification alleged bias and prejudice only as to petitioner Hoffa, and that the other petitioners could not have been prejudiced thereby (App. 117a-127a). In its opinion denying said affidavit for disqualification, the District Court stated that he did not know the affiant Monday, had never been introduced to her, had never had conversation with her, had not made the statements attributed to the Court by her, and that her affidavit was "patent perjury" (App. 117a, 118a, 127a).

Subsequent to said ruling by the Court, and before the Court decided the motion for new trial, petitioners filed motions for disqualification under Section 455, Title 28,

U. S. C. (App. 133a-138a) in which motions it was prayed that the Court disqualify itself on the ground that the Court by virtue of statements made in its opinion denying the earlier affidavits of disqualification had predetermined and prejudged allegations of the motion for new trial, had labelled a prospective witness as a perjurer and that by reason thereof the court had a substantial interest in the cause, and had already determined facts which were in issue in the pending motion for new trial, and that the Court could not thereafter rule on said motion impartially. The Court denied said motion for disqualification (App. 272a).

The Court of Appeals affirmed the District Court's ruling, denying the applications for disqualification of the court. The Court held that under the statute relating to affidavits of personal bias and prejudice of the Court such affidavits must be based on facts preceding the trial, not those occurring during the trial; that due diligence had not been shown in the obtaining of the affidavit attached to the application for disqualification; that the affidavit was equivocal; that the affidavit for disqualification did not contain a proper certificate of counsel, since the "statute is not satisfied by having another lawyer, who did not represent the defendant during the trial, execute the certificate"; and that petitioner Hoffa had filed an earlier such affidavit as to another Judge.

The Court of Appeals also affirmed the denial of the motion to disqualify under Section 455, ruling that the trial Court was neither a material witness nor did it have a "pecuniary" interest in the case.

The Court of Appeals also approved the denial of the motion for new trial on the ground that the Court's findings were supported by substantial evidence, that the allegations of the motion for new trial were not shown

to be newly discovered, and that due diligence in obtaining such information was not shown. A majority of the Court of Appeals held the trial Court could properly without a hearing determine the allegations of the motion based on the affidavits and counter-affidavits.

The dissenting opinion of Judge O'Sullivan stated that petitioners were entitled to a hearing on the issues of juror and marshal misconduct raised by the motion and the opposing affidavits, since the trial Court could not without a hearing properly determine issues related to events and acts alleged to have occurred outside of the court's presence.

REASONS FOR GRANTING THE WRIT.

I. Deprivation of Fair Trial—by Jurors' Failure to Disclose on Voir Dire Examination Their Pre-Existing Bias and Prejudice Against One of Petitioners and Their Intention to Convict Said Petitioner.

There is presented for decision here the question of whether a conviction can be permitted to stand where it is first discovered after trial that prior to trial certain jurors had expressed to others a prejudice and bias against a defendant and an intention to convict said defendant, if they became jurors. This question involves the constitutional right of petitioners to be tried by an impartial jury, including the right to obtain on voir dire examination relevant facts from the prospective jurors in order to enable petitioners intelligently to challenge veniremen.

In affirming the denial of the motion for new trial, the Court of Appeals concluded merely that petitioners had not shown due diligence in obtaining evidence of the jurors' bias and prejudice, and that the trial Court's findings were supported by "substantial evidence and are not clearly erroneous" (Op. 12, 13).

The latter pretermits the issue, for the District Court denied petitioners' request for a hearing, and ruled the motion on the affidavits only. As to due diligence, we point out, infra, pp. 21, 22, the impropriety of the trial Court's ruling thereon under the circumstances of this case.

But the question here involved is far too important in the orderly administration of justice to be so lightly brushed aside. Further, the court's ruling conflicts with applicable decisional law ruling that a new trial should be ordered where a juror conceals a material fact which, if disclosed, would likely have induced defense counsel to strike the juror. **Carpenter v. United States**, 100 F. 2d 716 (D. C. Cir.); **United States ex rel. DeVita v. McCorkle**, 248 F. 2d 1 (3 Cir.); **Photostat Corp. v. Ball**, 338 F. 2d 783 (10 Cir.).

There is no question here but that jurors Kilgore and Starnes, on their voir dire examination, expressly denied that they had any prejudice against any party to the suit, that they had any opinion as to the guilt or innocence of any defendant, and that they had previously expressed such an opinion (App. 60a-65a, 73a). Indeed, they also denied that they had discussed the case with anyone prior to their being summoned as prospective jurors. Further, the Court during the voir dire examination, in their presence, excused members of the panel who indicated that they had formed an opinion in the case (App. 59a-89a). Affidavits filed in support of petitioners' motion for a new trial unequivocally asserted that juror Kilgore, a few days before the trial, had told a fellow employee that if he got on the jury he would "hang" defendant Hoffa and see that Hoffa got what was coming to him; and that juror Kilgore prior to trial stated that "Hoffa is guilty as far as I am concerned", and after the trial stated, "I told you he was guilty and I meant what I said before when I said that I was going to get him, and I did my part, and it was worth it" (App. 46a-48a).

The affidavits attached to petitioners' motion for new trial further unequivocally asserted that juror Starnes had repeatedly revealed to his fellow employees that he disliked all unions; and a few days prior to the trial told his co-employees that if he got on the jury he would convict petitioner Hoffa because he should be convicted, that petitioner Hoffa was "no good and should be convicted and if he was on a jury trying him he would be convicted", and that petitioner Hoffa was guilty of "about anything they accused him of". Affidavits of three fellow employees of juror Starnes attested to the foregoing facts (App. 39a-42a).

Thus, this is not an instance where a hearing would only have produced evidence from which the Court could merely speculate as to whether a juror may have formed a prior opinion and concealed such fact. The facts asserted in the affidavits clearly show that two of the jurors who returned the verdict in this cause had an abiding and pre-existing prejudice against at least one petitioner, and a pre-existing determination to convict him before a word of evidence was presented.

The Court of Appeals for the Third Circuit has ruled that due process compelled a new trial for a defendant convicted in state court of murder committed in connection with an armed robbery, where it was learned after trial that one juror had failed to disclose on voir dire that he had previously been the victim of an armed robbery. **United States ex rel. DeVita v. McCorkle**, 248 F. 2d 1. It was held that the failure to disclose such material information served to defeat counsel's "right of challenge", and thereby the accused was deprived of a fair trial. If the failure of a venireman to disclose his prior connection with a totally unrelated crime be sufficient to warrant a new trial, *a fortiori* a new trial is necessary where a juror fails to disclose a hostility toward a defendant and a predisposition to convict him.

Nor do the jurors' protestations of impartiality on voir dire examination eradicate the inherent prejudice. In this respect the lower court's decision is incompatible with this Court's decision in **Irvin v. Dowd**, 366 U. S. 717, where it was held that due process of law requires that a juror should not be permitted to serve if by reason of intensive pretrial publicity the juror had formed a positive impression about the case which prevents him from considering the evidence clearly and impartially.

To permit an accused to have his liberty determined by a jury composed in part of persons hostile and already decided to convict is to remove from the judicial proceeding all semblance of due process of law. Review by this Court of a conviction thus obtained and a new trial denied without a hearing seems particularly appropriate.

II. The Denial of a Hearing on Petitioners' Motion for New Trial.

Although petitioners in their motion for new trial requested a hearing on the issues raised by their motion and affidavits (App. 11a), the trial Court chose to rule the motion for new trial on the Government's counter-affidavits, and denied the motion without a hearing (App. 257a-267a).

The majority decision of the Court of Appeals affirmed such denial of hearing, stating that "[i]t has long been settled that the District Court may hear a motion for a new trial on newly discovered evidence and decide it on affidavits". The dissent was of the opinion that a hearing should have been granted on the opposing affidavits of the parties relating to all allegations of the motion except the alleged bias of the trial Court.

The holding of the Court of Appeals, affirming the determination of the motion for new trial without a hear-

ing, is in conflict with decisions of this Court in **Mesarosh v. United States**, 352 U. S. 1, 14; **Communist Party of U. S. v. Subversive Activities Control Board**, 351 U. S. 115; and **United States v. Shotwell Mfg. Co.**, 355 U. S. 233, 241. In those cases the denial of a hearing on allegations of a similar nature was held to be reversible error.

The ruling of the Court below is also in conflict with **Wheaton v. United States**, 133 F. 2d 522 (8 Cir.), and **Richardson v. United States**, 360 F. 2d 366 (5 Cir.), which concern motions for new trial based on allegations of improper communication with a juror during the trial. Both cases were remanded to the District Court for an evidentiary hearing on the allegations set out in the motions. In **Wheaton**, where, as here, the trial Court had ruled the motion on affidavits, the Court of Appeals commented that the issues of the motion had not been competently determined, since it was apparent that the trial Court and the parties "did not realize the necessity of having evidence adduced". See also **Remmer v. United States**, 347 U. S. 227.

The affidavits filed by the respective parties in this case placed squarely in issue the question of whether the defendants were tried by a fair and impartial jury, or rather by a jury composed of individuals, some of whom had a pre-existing and abiding determination to convict one of petitioners. The affidavits of numerous individuals were in direct conflict with those of the two jurors, as to whether such jurors had expressed their intention to convict petitioner Hoffa if they "got on the jury". If said jurors did in fact make such statements, it is obvious that petitioners' right to a fair and impartial trial was clearly violated, and the subsequent trial was but a mere formality. Similarly, the affidavits filed by the respective parties were in direct conflict on the issues of whether the marshals and jurors were guilty of other acts of impro-

priety during the trial, whether the jurors were permitted to separate, and whether some jurors themselves during the trial expressed bias and prejudice toward the petitioners.[5]

The majority of the Court of Appeals relies on this Court's decision in **United States v. Johnson,** 327 U. S. 106, for support of its decision that the District Court here properly ruled the motion for new trial on the basis of affidavits alone. Reliance on **Johnson** is misplaced, in the circumstances of this case. For in **Johnson,** the contention of the defendant was that a prosecution witness had perjured himself during the trial of the cause. The defense filed affidavits in support of such contention and the government filed counter-affidavits. In ruling that the trial Court could properly consider and determine the motion for new trial on the basis of the affidavits, this Court held that the trial Court was well qualified to pass on the affidavits, since the trial Court had conducted the lengthy original trial and was able to observe closely the disputed witness' testimony, as well as the testimony of all of the other witnesses.

Similarly in other cases cited by the majority in support of its denial of a hearing, such as **United States v. Crowder,** 351 F. 2d 101 (6 Cir.), and **Lyles v. United States,** 272 F. 2d 910 (5 Cir.), the allegations of the particular motions for new trial related to matters occurring in the presence of the trial judge, such as the later recanting of earlier testimony given before the court. In such instances, it may well be that the trial court is quali-

[5] As set out earlier in the Statement, with regard to the allegations of marshal and juror misconduct, affiant Catherine Johnson has been convicted of perjury, and affiant Patricia Ann Essex has been convicted of obstruction of justice. Additionally, the government has asserted that affiant Monday has recanted her prior statements contained in her affidavit. By reason thereof we do not know whether these three witnesses would testify in the event a hearing is ordered.

fied to consider, scrutinize and determine the affidavits filed in view of its earlier first-hand observation of the witnesses and their testimony during the trial. But those cases are inapposite to the situation here in issue. For no observation of the jurors or marshals during the trial could in any way be of assistance to the court in determining whether such jurors and marshals had made extra-judicial statements prejudicial to the defense or engaged in improper conduct outside and away from the courtroom.

An important question for review and decision here therefore is whether, as the Court below rules, a trial court may, notwithstanding allegations of occurrences outside the presence and hearing of the court, choose to consider and decide such allegations without affording the parties a hearing.

III. The Denial of Petitioners' Application to Disqualify the Trial Judge, and to Have Their Motion for New Trial Considered by Another Judge.

This case presents important questions of general interest in the orderly administration of justice relating to the disqualification of a trial court during proceedings pending before said court.

In the consideration of the propriety of the District Court's denial of petitioners' motion to disqualify him, it must be remembered that the motion for new trial itself was based partly on an allegation that the trial Court was biased and prejudiced against the petitioners in that he had made prejudicial remarks outside of court during the trial, stating an intention to see that petitioner Hoffa was convicted. The motion for new trial also alleged misconduct on the part of marshals and certain jurors.

Simultaneously with the filing of such motion for new trial, petitioners moved the Court to disqualify itself from considering and determining said motion for new trial,

on the ground that it was biased and prejudiced against petitioners (App. 89a-92a, 98a-104a).

It was the contention of petitioners in the District Court and in the Court of Appeals that upon the filing of such affidavits of disqualification, pursuant to Section 144, Title 28, United States Code, the District Court should have proceeded no further and another judge should have been assigned to hear the proceedings. Notwithstanding the District Court's denial of the facts set out in said affidavits of disqualification, it was without the province of the Court to consider the truth or falsity of the affidavit. The only question was the sufficiency of the affidavits of disqualification. **Berger v. United States,** 255 U. S. 22. Indeed the trial court is obliged for the purposes of ruling said affidavits of disqualification to accept the truth of the facts asserted and may consider only the legal sufficiency thereof. **Mitchell v. United States,** 126 F. 2d 550 (10 Cir.); **Willenbring v. United States,** 306 F. 2d 944 (9 Cir.).

(a) The affidavit of disqualification asserted that the statements attributed to the trial Court were made during the trial, and that petitioners first learned thereof approximately one week prior to the filing of the affidavit of disqualification (App. 89a-90a). The Court below in affirming the denial of the affidavit of disqualification interprets Section 144 of Title 28, United States Code, as requiring affidavits of personal bias and prejudice to be predicated on facts **preceding** the trial rather than those occurring during the trial. The Court below states that bias and prejudice which occurs during a trial can be remedied only on review by the Court of Appeals. In this respect it should be pointed out that such review here would have been inadequate, since the main appeal from petitioners' conviction had already been determined by the Court of Appeals, at the time of the filing of the affi-

davits of disqualification. Moreover, this interpretation by the Court below of Section 144 is in conflict with **Hurd v. Letts**, 152 F. 2d 121 (D. C. Cir.), and **Willenbring v. United States**, *supra*. Although the statute provides that the affidavit of disqualification shall be filed at least 10 days before the beginning of the term in which the proceeding is to be heard, it excepts from this 10 day requirement the situation where the movant shows good cause for failure to have filed within such 10 day period. In **Willenbring**, it was held that where the case was not assigned until four days prior to a trial, to a judge who is biased against the accused the statutory 10 day period cannot constitute a bar to the consideration of the application. Similarly in **Hurd**, it was ruled that an application seeking disqualification of the trial court may be filed in the middle of a trial if the facts showing bias are not known to the accused until such time. Here the information relating to the bias and prejudice of the trial court was, according to the sworn affidavit of disqualification, learned only one week prior to the filing of the application for disqualification. To bar such application simply because the trial had concluded, where there are before the court important questions on motion for new trial related to whether petitioners were afforded a fair and impartial trial, is to frustrate proper application of the statute and this Court's teaching that our courts "shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial..." **Berger v. United States**, 255 U. S. 22, 36.

(b) The Court below affirmed the denial of the affidavit of disqualification for the further reason that the "statutory requirement as to certificate of good faith of counsel was not complied with" (Op. 6).

The statute requires that the affidavit of disqualification be "accompanied by a certificate of counsel of record

stating that it is made in good faith." The certificate was executed for petitioner Hoffa by Harold Brown and James E. Haggerty, Sr. (now deceased). Haggerty was a member of the Michigan Bar, and had participated in the trial as co-counsel for petitioner Hoffa. Harry Berke, Hoffa's local attorney and a member of the Bar of the District Court below, had withdrawn after trial and prior to the taking of the original appeal. Harold Brown had represented co-petitioner King during the trial and was a member of the Bar of the District Court below. Thus the certificate was executed by a member of the Bar of the District Court, who had in fact participated at the trial below.

Nevertheless, the court below affirms the denial of the affidavit of disqualification by stating that the "statute is not satisfied by having another lawyer, who did not represent the defendant during the trial, execute the certificate" (Op. 7). We submit that it is anomalous to seek to avoid the statutory provision on the ground that the local attorney who had represented said petitioner at trial was no longer available. If such were the rule, an accused whose local counsel has died or become ill or withdrawn from the case for any reason could under no circumstances seek to invoke the provisions of Section 144, and the application of this pertinent statutory provision would be unavailing. This would be contrary to a system of law endeavoring "to prevent even the probability of unfairness." **In re Murchison**, 349 U. S. 133, 136. In the exercise of its supervisory power, this Court should review such statutory interpretation to preclude a resulting denial of due process of law to these petitioners. See **Offutt v. United States**, 348 U. S. 11, 14.

(c) In any event, this Court in the exercise of its broad supervisory power should review the lower Court's approval of the denial of petitioners' motion for disqualifi-

cation of the trial court under Section 455, Title 28, United States Code. As stated, in denying petitioners' earlier affidavits for disqualification under Section 144, the District Court not only denied that he was prejudiced against petitioners, that he knew the affiant Monday, or that he had ever met her or made any statements to her with regard to the petitioners (App. 117a-118a), but also branded her affidavit as "patent perjury" (App. 127a).

Thereafter petitioners moved the Court under Section 455 to disqualify itself on the ground that the Court by virtue of its denial of the factual allegations had in fact predetermined the allegations of the motion for new trial itself, and that the Court thereby was a material witness and had a substantial interest in the matter pending before it.

It must be remembered at said time the government had not yet filed its counter-affidavits to the motion for new trial. There remained for the Court to decide and to exercise its discretion on the issue of whether petitioners were entitled to a hearing on their motion for new trial, the issue of whether petitioners had exercised due diligence in the obtaining of the "newly discovered evidence", and the issue of whether ultimately petitioners were entitled to a vacation of their convictions and a new trial. Surely the matter of the Court's disqualification under such circumstances cannot be held to rest solely, as the Court below said, on whether the trial Court had a "pecuniary" interest in the outcome of the proceeding (Op. 8). For the interest of the trial Court here was greater than that of money. The Court had already ruled on the credibility of a witness in support of the motion for new trial, who had not yet been heard. Further, this witness made serious allegations against the Court itself, which only the Court could deny. Surely then the Court was a material witness, and did have a substantial in-

terest in the case. Since, as this Court has held, even the probability of unfairness must be prevented in our system of law, a court should not be permitted to sit in a case where it has an interest in the outcome. **In re Murchison**, 349 U. S. 133, 136. See also **United States v. Valentino**, 283 F. 2d 634 (2 Cir.).

Totally aside from the issue of the credibility or truth or falsity of the affidavit charging the trial Court with bias, it is urged that having declared said affidavit to be false, the trial Court was no longer in an appropriate frame of mind to consider impartially the matters remaining before it for determination, to-wit, the granting of a hearing, the determination of the legal sufficiency of the motion for new trial, and the ultimate issue of whether to grant a new trial. The statements of the Court indicated an unwarranted prejudgment of an issue in the cause and rendered invalid a resulting judgment of such court. **Knapp v. Kinsey**, 232 F. 2d 458, 466 (6 Cir.). See also the recent case of **Halliday v. United States**, 380 F. 2d 270 (1 Cir.), which involved a motion under 28 U. S. C., Section 2255 alleging that the Court in accepting a plea of guilty had failed to make inquiry as to the voluntariness of the plea and the defendant's understanding of the charges. It was there held improper for the original sentencing Judge, who had made a finding of the voluntariness of the plea, now in effect to review the correctness of his own determination.

Nor is it a sufficient answer to petitioners' contention to hold that they were not prejudiced, on the ground that they were not entitled to a hearing on their motion for new trial. Even if they were not entitled to a hearing, their motion for new trial should have been **considered and determined** by an impartial court, and certainly not by a court which had already made a judicial finding on an issue before it.

CONCLUSION.

For all the reasons hereinabove advanced, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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